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No. 08-535

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

Chandrakant Pansé, *Petitioner*,

v.

Lindsay Norman, et al., *Respondents*

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the First Circuit

Petition for Rehearing of Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether the constitutionally mandated pre-deprivation due process, for termination of protected property or liberty interests, stands denied absent an adequately unbiased hearing officer as a quasi-adjudicator.

II. Whether denial of timely post-deprivation due process upon termination of protected property and liberty interests is unconstitutional.

Parties

Narrowed from Petition for Certiorari

Chandrakant Pansé, *J.D.*,

Plaintiff-Appellant and Petitioner,

v.

Lindsay Norman,
Judith Gill,
Peter Tsaffaras, *Esq.*,
Andrew Scibelli, and
Haidee Morris, *Esq.*,
each personally,

Defendants-Appellees and Respondents

The petitioner is a tenured professor at a State College.

The all respondents were (and some still are) high State education officials at the time of their actions in this matter..

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STATEMENT OF THE CASE

THIS COURT SHOULD REHEAR THIS MATTER

The petitioner, Pansé, in the interest of avoiding gross injustice, respectfully requests a rehearing of two questions of law which are well-settled in this Court, because the holdings of the United States Court of Appeals for the First Circuit cannot be reconciled at all with clear and important precedents of this Court.

This petition is significantly narrower, and thus very different in scope, than the petition for certiorari, and requests only *stare decisis* as to the two questions presented here.

The petition for certiorari had presented somewhat detailed facts and had raised numerous questions, all of which Pansé believed in good faith to be highly compelling, regarding critical protections under the Due Process and Free Speech Clauses of the Constitution of the United States and federal civil rights laws. On most of these issues, this Court has issued clear decisions in the past.

In the petition for certiorari, Pansé believed in good faith that a review of application of decisions of this Court to the various facts in this case was warranted in this Court in view of the irreconcilability of the decisions in the First Circuit with those of this Court, and particularly in view of the severe harms inflicted on the petitioners due to raw abuses of governmental power here.

Pansé understands that this Court would be

quite concerned regarding the abilities of a fresh law school graduate to present the level of argument required in this Court, and thus the Court would be reluctant to expend the very limited resources of this Court even for such compelling issues.

Hence, Pansé eliminates the other petitioners and several respondents from the earlier petition, eliminates majority of the facts, eliminates all official capacity claims against State employees and arms of the State (asserted pursuant to a recent decision of this Court,) and eliminates the majority of the issues, and limits this request for a rehearing to only *stare decisis* for the first two of the questions presented earlier.

Pansé respectfully submits in good faith that oral argument on these issues should not be necessary, or no significant oral argument be called for, because the holdings of this Court on the two questions presented here are crystal clear, and it is equally clear that the rules followed in the First Circuit, with all due respect to the Court of Appeals for the Circuit, do not adhere to this Court's holdings.

Therefore, Pansé believes that this narrowing of the issues here would aid in speedy resolutions of the two questions presented here, and in uniform applications of important holdings of this Court.

Thus, this Court would avoid injustice to multiple public employees in the First Circuit, and avoid gross injustice to the petitioner, by requiring that the First Circuit, with all due respect to that Court, implement this Court's clear holdings on the two questions presented here.

ESSENTIAL FACTS

A more detailed version of the facts, with citations to the record below, appears in the petition for certiorari, at 2-11.

Pansé is a dedicated and exemplary teacher, and played a critical role in creation of a highly innovative and successful program in biotechnology education at a two-year State college. Towards that end, he has been outspoken on the issue of raising educational standards in such State schools.

This case arises from a deliberately prolonged deprivation of Pansé's protected employment until his reinstatement under Orders of an Arbitrator and a State court.

At the time of this deprivation, the respondents were under a written 34 C.F.R. § 100.7(e) civil rights warning to refrain from retaliation against, and intimidation of, Pansé. This warning had been issued in response to a complaint filed with the federal Department of Education by another professor.

Pansé and college officials were also in litigation, ongoing in State Superior Court at that very time of that deprivation, for the college officials' retaliation for Pansé's exercise of the Free Speech Clause, with a State court holding in place as a matter of law that Pansé's speech in question was indeed protected. Respondent Norman, then President of the college, had specifically told Pansé that Norman was displeased with Pansé's exercise of the protected speech and that Norman was watching Pansé.

Prior to any pre-deprivation process, Norman declared to respondent Gill that Norman was "taking action to terminate the employment of the two professors," one who had filed the civil rights complaint, the other being Pansé, both having cooperated fully with a federal investigation arising from that complaint. Norman then proceeded to terminate both the professors.

To terminate the protected employment of Pansé, Norman used as an excuse some concerns regarding one biotechnology research course taught by Pansé, although Pansé had taught many other courses regarding which there were no concerns at all.

At a pre-deprivation hearing, Norman denied Pansé's objection that Norman, as a party-opponent in the then ongoing litigation for retaliation, could not judge Pansé.

An arbitrator, and subsequently a State Superior Court, held that Pansé's termination appeared related to the ongoing litigation for retaliation of protected speech. The Arbitrator made an extraordinary finding that the respondents could not even subject Pansé to any discipline, "much less discharge" (but made no mention of the written civil rights warning to refrain from retaliation.)

Respondents Gill, Tsaffaras, and Morris caused extreme delays in the post-deprivation arbitration process, through tactics such as refusing to agree to any hearing dates for months at a time, prolonging the process for up to an extraordinary four years.

All respondents are very highly educated, experienced and knowledgeable individuals, and acted thoughtfully and in concert.

Respondent's actions caused the Pansé family extreme harms, as had been predicted and warned by this Court.

Pansé sued in the U.S. District Court (D. MA.) The Court dismissed most of the *pro se* complaint, for failure to state a claim, and the United States Court of Appeals for the First Circuit affirmed.[1]

The district court denied, in part, a motion for summary judgment, then granted the part denied earlier. The U.S. Court of Appeals for the First Circuit summarily dismissed a timely appeal, and then dismissed a motion to stay mandate.

On December 8, 2008, this Court denied a timely petition for certiorari.

Pansé now respectfully submits a highly curtailed petition, albeit with somewhat expanded quoting from this Court's decisions, requesting *stare decisis* only, for a rehearing as the only means to avoid extreme injustice to him and his children.

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[1] *Cf.*, *Boag* v. *MacDougall*, 454 U.S. 364, 365 (1982) (it is an error as a matter of law to dismiss a *pro se* complaint for failure to state a cause of action.)

I. THE CONSTITUTIONALLY MANDATED PRE-DEPRIVATION DUE PROCESS, FOR TERMINATION OF PROTECTED PROPERTY OR LIBERTY INTERESTS, STANDS DENIED ABSENT AN ADEQUATELY UNBIASED HEARING OFFICER AS A QUASI-ADJUDICATOR

Due process requires a constitutionally minimum pre-deprivation hearing for termination of a tenured public employee. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 542 (1985).

This Court has held in a unanimous decision that "As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities" (emphasis added.) *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982), citing, as one example, *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 -243, and n. 2 (1980).

As for the rationale for this unequivocal demand for impartiality, i.e., for the requirement of lack of bias, on part of the hearing officer, this Court observed that "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.' " *Schweiker*, 456 U.S. 195, citing *In re Murchison*, 349 U.S. 133, 136 (1955), which had quoted from *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

To be sure, there is a presumption that such hearing officers are unbiased, but "This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Schweiker*, 456 U.S. 195 (citation omitted.) "[T]he

burden of establishing a disqualifying interest rests on the party making the assertion." *Id.*

This Court later explained, albeit somewhat indirectly, the requirement for the pre-deprivation hearing officer being unbiased: at any such hearing, this Court requires a "meaningful opportunity to invoke the discretion of the decisionmaker." *Loudermill*, 470 U.S. 543.

However, the United States Court of Appeals for the First Circuit applied an irreconcilable standard to the case at bar: *Chmielinski* v. *Mass. Office of the Comm'r of Prob.*, 513 F.3d 309, 318 (1st Cir. 2008) ("We have held that there is no requirement that the hearing officer be impartial.")

Pansé respectfully insists that the *Chmielinski* rule in the First Circuit cannot be reconciled with *Schweiker*'s requirement of impartiality, and therefore *Chmielinski* should be struck as plain error of law.

The Court of Appeals also denied the critical *Schweiker* right to rebut the presumption of impartiality, for Norman, as a party opponent in ongoing litigation for retaliation, could not possibly serve as an impartial hearing officer. Thus, Pansé was denied the *Loudermill* right of a meaningful opportunity to appeal to the discretion of the hearing officer. This constitutes further reason to strike *Chmielinski* as plain error of law.

(The Court of Appeals did hold that the lack of impartiality "does not itself determine whether bias can be so severe as to interfere with due process at the

hearing itself." *Chmielinski*, 513 F.3d 318.

Even under this standard, the pre-deprivation hearing officer, Norman, here should be seen as so severely biased, on account of being a party opponent in ongoing litigation for retaliation, that he could not possibly serve as the quasi-adjudicator. This provides an equally compelling reason, as a matter of fact, to hold that Panse was denied any pre-deprivation due process.)

This Court has observed that all these elements of the pre-deprivation due process are important, even where facts for termination of employment are clear: this Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Id. See, also, FDIC* v. *Mallen*, 486 U.S. 230, 243 (1988) (same.)

This Court also found that the impact of wrongful termination "may be so devastating," causing such "traumatic disruptions," that the employee will "almost inevitably suffer irreparable injury" which "will never be recompensed." *Id.* at 549-550 (Marshall, J., concurring.)

Therefore, "By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986).

The government and the society also benefit by keeping the employee, *Loudermill*, 470 U.S. at 544, justifying "an initial check against mistaken

decisions," *id.* at 545. (Therefore, this Court does suggest an alternative to termination: suspending with pay, pending the more complete post-deprivation due process hearing. *Id.* at 544.)

The respondents here avoided any reasonable alternative, such as assigning Pansé to teach courses regarding which they had no concerns, particularly in a case so devoid of cause that the Arbitrator held that the State had no case at all.

Wherefore, this Court should conclude that the United States Court of Appeals for the First Circuit committed a plain error of law in its holding that the pre-deprivation hearing officer need not be impartial, and committed plain error of law in denying the right to rebut the presumption of impartiality of a hearing officer.

Wherefore, this Court should hold that Pansé, as a matter of law, was denied any pre-deprivation opportunity to be heard at all, and thus Pansé was denied his constitutional pre-deprivation due process guarantees.

Wherefore, this Court should reverse and remand for an application of *Schweiker* and *Loudermill* to the facts of this case.

II. DENIAL OF TIMELY POST-DEPRIVATION DUE PROCESS UPON TERMINATION OF PROTECTED PROPERTY AND LIBERTY INTERESTS IS UNCONSTITUTIONAL

This Court has been very clear in requiring prompt post-deprivation due process where the government terminates a citizen's protected interest.

"[T]he allegation of a distinct due process violation in the [post-deprivation] administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether" (emphasis added.) *Loudermill*, 470 U.S. 547 n. 12.

This Court has "[E]mphasized that . . . account must be taken of the length . . . of the deprivation," *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). Due process requires a hearing "at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). At some point, a delay in the post-termination does become a constitutional violation. *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979) (post-deprivation hearing followed only a few days after suspension.)

Promptness, or lack thereof, in post-deprivation due process must be considered. *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997). If a post-deprivation hearing is sufficiently prompt, then the lost income for an employee can be relatively insubstantial and health insurance may not be affected at all, limiting any undue harm to the employee. *Id.* (This Court did remand *Homar* for determination of damages from deprivation of a few days. *Id.*, at 936.)

However, even prompt post-deprivation process may not "make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury." *Loudermill*, 470 U.S. 550 (Marshall, J., concurring.)

A 9-month long post-deprivation adjudication was not unconstitutional *per se* where there was only a conclusory claim that it took too long, without an allegation of a cause. *Loudermill*, 470 U.S. at 547. However, the Court plainly did "not state a flat rule that 9-month delays . . . will pass constitutional scrutiny as a matter of course." *Id.*, at 553 (Brennan, J., concurring in part and dissenting in part.)

Here, Pansé went three and a half years without his paycheck and back-pay, and almost four years without his family medical insurance. This was because the respondents deliberately stretched the post-hearing process to such extremes. This caused injuries to Pansé, harms so severe that they cannot ever be fully recompensed, just as had been predicted by this Court in *Loudermill*.

This Court should hold that the United States Court of Appeals for the First Circuit did not comply with *Barchi* and *Homar*, and thereby committed plain error of law, in holding that such extreme and deliberate delays as here can pass constitutional muster, and committed plain error of law in dismissing Pansé's *Loudermill* right of an altogether separate cause of action in the extreme and deliberate post-deprivation delay.

Therefore, this Court should reverse and remand.

CONCLUSION AND RELIEF SOUGHT

Petitioner Pansé demonstrates here that critical grounds exist for this Court to take the highly unusual action of rehearing a case. These grounds consist of plain errors of law, with all due respect to the Court, by a United States Court of Appeals, and the resulting severity of injustice.

Pansé suffered the injuries predicted by this Court in *Loudermill*, and suffered worse, as direct result of the actions of the respondents.

Pansé submits respectfully that the denial of his claims as a consequence of non-adherence to this Court's critical holdings in the First Circuit has resulted in gross injustice.

Wherefore, this Court should grant the rehearing requested, and find that the Court below, with all due respect to that Court, was in plain error of law by not adhering to the *Schweiker* requirement of impartiality of a pre-deprivation quasi-adjudicator, and in plain error of law in denying the *Schweiker* right to rebut the presumption of impartiality, and in plain error in denial of the *Loudermill* right to a claim for post-deprivation delay as a separate cause of action.

Wherefore, this Court should hold that Pansé was denied any procedural due process whatsoever, either pre-deprivation or post-deprivation.

Thus, this Court should avoid extreme injustice by granting the rehearing requested, and by granting this request to reverse and remand.

Respectfully submitted,

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RULE 44.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing complies with this Court's Rule 44.2.

I present this petition in good faith, and not for any delay.

The questions presented here are limited to those presented in the petition for certiorari. The petition presents quotations from decisions of this Court for critical grounds for this Court's consideration, and these were not previously presented, and these issues and quotations are of grave significance.

Respectfully submitted,

Chandrakant Pansé, *J.D.*